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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

DEL NORTE SENIOR CENTER, INC.,
Plaintiff and Appellant,
v.
TRACY L. STELLING et al.,
Defendants and Respondents.

A145016

(Del Norte County
Super. Ct. No. CVUJ 12-1430)

Del Norte Senior Center, Inc. (Senior Center) appeals following a nine-day trial in which the jury found in favor of Tracy Stelling, an accountant who had been hired by the Senior Center as an independent contractor to perform bookkeeping services, including for the Senior Center's energy program, through which it administered various energy contracts funded by government agencies. The Senior Center was forced to return government funds due to accounting irregularities in the energy contracts it administered. The Senior Center sued Stelling and two of its own former employees, seeking damages for, among other things, disallowed costs of its energy program, audit costs, and loss of revenue from suspended contracts. Both Senior Center employees were found to have been negligent, as was the Senior Center itself, but Stelling was found non-negligent in performing her limited accounting duties.

The Senior Center contends (1) the judge improperly refused to instruct the jury on a theory of negligence per se; (2) there was no evidence supporting (a) the jury's finding of negligence on the Senior Center's part, (b) non-negligence on Stelling's part,

and (c) the jury's calculation of $170,000 as the value of canceled contracts; and (3) the judge erred in awarding Stelling expert witness fees because her settlement offer under Code of Civil Procedure section 998 was not made in good faith. We find no error and will affirm the judgment.

I. BACKGROUND

The Senior Center is a private, non-profit public benefit corporation, governed by an all-volunteer board of directors, that derives a significant portion of its funding from contracts for administering federally-funded programs. Between January 2009 and December 2010, Cynthia Brande was the Senior Center's executive director, responsible for the day-to-day management and supervision of the organization. Eileen Silvey was the Senior Center's energy program manager during that time, with oversight of all aspects of that program.[1] The Senior Center contracted with Tracy Stelling, a certified public accountant (C.P.A.), for bookkeeping, payroll, and other accounting services.

Stelling was an independent accountant who did bookkeeping and tax preparation for individual clients and businesses from Crescent City, California to Brookings, Oregon. The Senior Center was one of her clients between 2002 and 2011; she worked about eight hours a week there. Stelling performed basic bookkeeping work, and she explained the services she performed to the jury. For example, she would input invoices into QuickBooks to create a general ledger for the Senior Center. She also created financial reports from the QuickBooks database when requested by Brande or the Senior Center's board of directors.

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[1] Between January 2009 and December 2010, the Senior Center was the designated provider of federal Low Income Household Energy Assistance Program (LIHEAP) and Department of Energy, American Recovery and Reinvestment Act (DOE-ARRA) utility assistance and weatherization services through funding contracts with the California Department of Community Services and Development (CSD), the state program oversight agency. During the same period, the Senior Center also received funding for energy-related services to low-income households through a contract with the local utility provider, Pacific Power and Light (PP&L). The LIHEAP, DOE-ARRA and PP&L contracts are collectively referred to as the Senior Center's "energy program."

Members of the Senior Center's board of directors testified to their understanding that Stelling was responsible for fiscal reporting, keeping the account records, and providing fiscal oversight for the entire organization. But according to an engagement letter dated January 29, 2002, Stelling contracted only to: (1) prepare accounts payable checks at a minimum of two times monthly; (2) prepare semi-monthly payroll checks, monthly payroll deposits, quarterly payroll reports, and annual payroll reports, including W-2's and 1099's; (3) review the check registers and reconcile each bank account monthly; (4) prepare monthly statements of support revenue and expenses; and (5) prepare monthly reports as needed to fulfill grant obligations. Stelling characterizes her role at the Senior Center as that of a part-time bookkeeper.

Donald R. Reynolds, C.P.A., performed an annual independent audit of the Senior Center for the fiscal year ended June 30, 2010, as he had done every year since 2005. In the course of the audit, Reynolds discovered an electronic payment made on a credit card that appeared to have been unauthorized; no one recognized the credit card account as belonging to the organization. Reynolds brought the issue to the attention of the Senior Center's board of directors in December 2010.

Although the Senior Center portrays Reynolds's discovery of the payment as part of his normal audit process, Stelling points to evidence that Brande brought the matter to Reynolds's attention. In an email to CSD on January 28, 2011, Brande said she had noticed an "unusual transaction" by Silvey involving the Senior Center's credit card, and she said Silvey was embezzling from the organization. Brande informed CSD there was an open criminal embezzlement case against Silvey, and said Silvey had been fired. She further claimed the Senior Center's "accountant was covering Ms. Silvey's activities and performing sub-standard work." Brande told a member of Reynolds's firm the embezzlement had been going on for years, along with other wide-ranging, long-standing misconduct by Silvey; Brande said she had not reported it because of fear for her personal safety. Brande accused Silvey of many forms of misconduct, including telling staff they could take time off and falsely billing it to government contract work; bullying workers to keep them from reporting her misdeeds; charging personal goods to Senior

Center accounts; having inadequate documentation for charged expenses; charging inappropriate items to government contracts, such as gifts, meals and entertainment; double-billing; hiring a relative; and even performing sexual favors for vendors.

At trial, Stelling's expert described Reynolds's and the board's response as a "three alarm" reaction, and opined that Reynolds lacked objectivity as an auditor because he had a stake in shaping the outcome; he had performed audits annually for several years without catching these problems. Stelling's expert and the Oregon Board of Accountancy's investigator claimed Reynolds did not have sufficient evidence to conclude Silvey was actually embezzling or Stelling was involved, yet Brande reported Silvey to the district attorney, and Mazzei, with Reynolds's drafting assistance, reported Stelling to the professional boards governing accountants in both California and Oregon. The Oregon Board of Accountancy hired an accountant to investigate Mazzei's complaint, and he concluded that no embezzlement or fraud had occurred. The jury ultimately found that Reynolds was negligent and Stelling was not, but it found Reynolds's negligence was not a substantial factor in causing harm to the Senior Center.

Stelling suggests the whole debacle was part of a power play by Brande. Stelling contends there was a competitive relationship between Brande and Silvey, and Brande wanted to set Silvey up to be fired. There was no reason to panic about the initial questioned transaction, Stelling says, which was made on Silvey's own personal credit card (not a Senior Center account), a transaction that Stelling says was authorized by Brande herself. According to an investigation later conducted at the behest of the Oregon Board of Accountancy, Silvey used her personal credit card for both personal and Senior Center expenses and received reimbursement from the Senior Center for the expenses attributable to the organization. Reynolds admitted in his testimony that the card had originally been taken out in Silvey's name but said it had been used to make purchases for the Senior Center for 10 years.

The payment in question had been made because the credit limit had been reached on the credit card, and additional Senior Center purchases could not be made on the card unless the balance was paid down. Because Brande was not present at the time, Silvey

called the bank and did an electronic transfer to pay down the balance so that additional charges could be made on the account for materials needed to perform the Senior Center's contracts. Silvey was not authorized to make such transactions, but Brande authorized it retroactively, back-dating the paperwork showing her approval. Thus, although there were some irregularities involved, Burns found that Silvey had not been guilty of fraud or embezzlement in connection with that transaction.

Stelling presented testimony supporting a theory that, if the Senior Center had not "jumped the gun" on alerting CSD and the district attorney to the suspected embezzlement, the problem could have been explained and contained, and the Senior Center would not have had its contracts canceled. As the facts unfolded, however, the Senior Center reported Silvey to the district attorney; Silvey was arrested and charged with multiple counts of felony embezzlement, burglary and forgery. In June 2013, Silvey pleaded no contest to only one count of misdemeanor forgery, and all other charges were dismissed.

Once Reynolds reported the "unusual transaction" to the board, the board authorized him to expand the scope of his work to see if Silvey was mismanaging Senior Center accounts or embezzling from the organization. In January 2011, the board fired Silvey and two weeks later terminated Stelling's contract. Brande hired a new accountant to go over the books and implement changes in the bookkeeping function, as needed. Stelling suggests the board acted rashly, without giving her or Silvey a chance to explain the questioned transaction. By her reckoning, the Senior Center's panicked reaction triggered a chain of events that resulted in the Senior Center's lost contracts.

After CSD learned a criminal investigation was being conducted into Silvey's alleged embezzlement, it sent its own team of monitors to investigate and assess the situation. As a result of its investigation, CSD issued a notice of official enforcement action on February 22, 2011, which included the immediate suspension of the Senior Center's energy program contracts effective the next day. The remainder of the Senior Center's 2010 LIHEAP contract and at least three subsequent contracts were awarded to another agency. The notice and its associated critical issues reports identified multiple

deficiencies in the fiscal and programmatic management of the energy program, including program non-compliance, inability to trace expenses back to source documentation, non-existent internal controls, and other compliance issues.

Following the cancellation of its contracts, the Senior Center terminated Brande's employment in early March 2011, leaving what Stelling calls a "leadership vacuum." On March 8, 2011, the Senior Center hired a new executive director, Charlaine Mazzei, who undertook to interface with CSD over the accounting issues, according to Stelling, without consulting with the terminated employees or bookkeeper.

CSD's February 22, 2011 notice required several actions on the Senior Center's part, including a fiscal and programmatic audit. The Senior Center completed the required audit using Reynolds as the auditor, at a cost of more than $36,000. The fiscal audit for the period ended June 30, 2010 was issued in approximately April 2011. Reynolds issued a qualified opinion on the financial statements, which contained 11 categories of findings and questioned costs, including issues with timesheets and payroll reporting; unauthorized personal expenses and credit cards; unallowable costs; undocumented cost allocations; client eligibility and selection; illegal building activities; conflict of interest; false claims; training; competitive bidding and contract compliance; and testing, documentation and forged documents.

In September 2012, the Senior Center reported Stelling to both the California Board of Accountancy and the Oregon Board of Accountancy, alleging that Stelling had breached her contract with the Senior Center and failed to adhere to the standard of care as an accountant. The types of accounting complaints reported in these letters were similar to those ultimately at issue in the lawsuit here on appeal. The Senior Center made these complaints to the professional boards before it had located a copy of Stelling's engagement letter. The Oregon Board of Accountancy retained Gerald Burns, C.P.A., as a private investigator to evaluate the Oregon complaint. His testimony will be summarized below.

On July 11, 2011, CSD issued a demand to the Senior Center for repayment of funds in the amount of $385,474 based on the audit report completed by Reynolds. The

Senior Center disputed CSD's finding that all costs questioned by the audit report were justifiably disallowed. After additional review, on October 12, 2012, CSD issued a second letter demanding repayment of disallowed costs in the amount of $501,339.69. Unlike the disallowance notice based on Reynolds's audit, which was limited to a single fiscal year, this disallowance demand was based on a full file review of three energy program contracts between January 2009 and December 2010. Many of the Senior Center's costs were disallowed because of failure to document labor hours, overcharging of labor hours, double-billing, improper client services, conflicts of interest, and unallowable expenditures.

After the Senior Center submitted additional documentation to CSD, on March 25, 2014, CSD issued a notice of final cost disallowance which reduced the disallowed costs to $302,484.93. The reasons for disallowances continued to be inability to adequately document purchases, inadequate justification for work that was done, unallowable work, double-billing, conflicts of interest, and lack of documentation for payroll.

In December 2012, the Senior Center filed a first amended complaint against Brande, Silvey and Stelling, alleging breach of contract by Stelling and negligence on the part of all three defendants, seeking damages to cover the reimbursement demand, loss of contracts, the cost of the CSD-imposed audit, the cost of revamping its bookkeeping system, and other damages.[2] A jury trial commenced on January 13, 2015. Only the Senior Center, Stelling and Silvey participated; Brande failed to appear, and a default was entered against her. Silvey appeared, but without counsel; she did not testify and offered no evidence.

On January 27, 2015, a verdict was returned in favor of Stelling, with a finding that Stelling did not breach her contract with the Senior Center and was not negligent. The jury poll disclosed the verdict was 10 to 2 in favor of Stelling on the question of negligence. The jury also found: (1) Brande and Silvey were negligent, (2) the Senior

[2] The operative complaint was apparently the second amended complaint, which is not contained in the record on appeal. No one disputes, however, the nature of the causes of action alleged, as stated in the text.

Center itself was negligent, and (3) Reynolds was also negligent. The jury found $509,249.76 in total damages: $36,764.83 for the CSD-mandated audit; $302,484.93 to cover the reimbursement to CSD for disallowed costs; and $170,000 as lost administrative revenue from terminated or suspended CSD energy program contracts. It awarded no damages for the creation of a "remedial" bookkeeping system, evidently believing such a step was unnecessary.

The jury apportioned liability for the losses between the two former employees and the Senior Center itself. The verdicts show the jury believed Brande was chiefly responsible for the cost of the audit, assessing her 70 percent responsible, Silvey 20 percent responsible, and the Senior Center 10 percent responsible, with no responsibility assigned to Stelling. Evidently, the jury believed Stelling's theory that Brande reported the problems to CSD prematurely and brought the audit down on the Senior Center unnecessarily. The Senior Center was assigned 5 percent responsibility for disallowed program costs found during CSD's investigation, while Silvey was determined to be 50 percent responsible for the disallowed costs, Brande 45 percent responsible, and Stelling again was found to have no liability. The Senior Center was determined to be 100 percent responsible for $170,000 in its own lost administrative revenue from CSD's suspension of its contracts. On February 26, 2015, the trial court entered judgment accordingly. The Senior Center filed a timely appeal from the judgment and from a post-judgment order awarding costs to Stelling, which included more than $30,000 in expert witness fees.

II. DISCUSSION

A. Negligence Per Se Instruction

1. The Senior Center's Requested Instruction

The Senior Center included in its complaint a cause of action for "negligence per se" alleged against Stelling, as well as a separate cause of action for "professional negligence." The Senior Center evidently requested a negligence per se jury instruction modeled on CACI No. 418, but we find no copy of the requested instruction in the record. For the lack of an adequate record alone, we would be justified in rejecting the

Senior Center's claim of error. (*Jameson v. Desta* (2018) 5 Cal.5th 594, 609.) Based on the colloquy in the reporter's transcript, however, we proceed to the merits using our reconstructed language of the requested instruction as the factual basis for the Senior Center's allegation.

CACI No. 418 reads: "[Insert citation to statute, regulation, or ordinance] states: _____. [¶] If you decide [¶] 1. That [name of plaintiff/defendant] violated this law and [¶] 2. That the violation was a substantial factor in bringing about the harm, then you must find that [name of plaintiff/defendant] was negligent [unless you also find that the violation was excused]. [¶] If you find that [name of plaintiff/defendant] did not violate this law or that the violation was not a substantial factor in bringing about the harm [or if you find the violation was excused], then you must still decide whether [name of plaintiff/defendant] was negligent in light of the other instructions." (CACI No. 418.)

Judging by the Senior Center's argument on appeal, we infer that the instruction proposed by the Senior Center inserted California Code of Regulations, title 16, section 58 where the opening brackets appear.[3] That regulation reads: "Licensees engaged in the practice of public accountancy shall comply with all applicable professional standards, including but not limited to generally accepted accounting principles and generally accepted auditing standards."

The Senior Center's requested jury instruction was denied. The court explained "I don't find any connection whatever she failed to do on a professional level with causation. I'm telling the jury you find she violated a rule of the rules of accountants,

[3] The only other statute or regulation cited by the Senior Center on appeal was this: "The board may by regulation, prescribe, amend, or repeal rules of professional conduct appropriate to the establishment and maintenance of a high standard of integrity and dignity in the profession." (Bus. & Prof. Code, § 5018.) The Senior Center also cited California Code of Regulations, title 16, sections 65 [independence] and 68.1 [retention of work papers] in its first amended complaint. Considering these other provisions that Stelling allegedly violated, we still find no basis for a negligence per se instruction.

you're instructed that negligence is presumed. That's not fair. And that's not an accurate statement of the law. None of these regulations were designed to protect from the harm you claim."

2. The Law of Presumed Negligence

The negligence per se doctrine is codified at Evidence Code section 669, which provides in relevant part: "(a) The failure of a person to exercise due care is presumed if: [¶] (1) He violated a statute, ordinance, or regulation of a public entity; [¶] (2) The violation proximately caused death or injury to person or property; [¶] (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and [¶] (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted." Ordinarily, the first two elements are questions for the trier of fact, and the last two are determined by the trial court as a matter of law. (*Jacobs Farm/Del Cabo, Inc. v. Western Farm Service, Inc.* (2010) 190 Cal.App.4th 1502, 1526; *Lua v. Southern Pacific Transportation Co.* (1992) 6 Cal.App.4th 1897, 1901-1902 (*Lua*).) Negligence per se establishes an evidentiary presumption of negligence; it is not a separate cause of action and does not create a private right of action for violation of a statute. (*Johnson v. Honeywell Internat. Inc.* (2009) 179 Cal.App.4th 549, 555-556.) The doctrine of negligence per se " 'creates an evidentiary presumption that affects the standard of care in a cause of action for negligence.' " (*Id*. at p. 555.) The presumption may be rebutted, as provided by statute. (Evid. Code, § 669, subd. (b).) If it applies, the presumption reverses the burden of proof.[4]

[4] If established, the presumption of negligence in Evidence Code section 669, subdivision (a), is a presumption affecting the burden of proof. (Evid. Code, § 660.) "The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact." (Evid. Code, § 606.)

The Senior Center contends the trial court erroneously resolved the first and second elements under Evidence Code section 669 in deciding the instruction would not be given. Those factors, it suggests, should have been left to the jury to decide. Because the court mentioned "causation," the Senior Center insists the court decided the issue of proximate cause under the second factor listed above.

We think the court properly decided instead that the injuries alleged by the Senior Center were not "of the nature which the statute, ordinance, or regulation was designed to prevent" under the third element identified above, which is a question for the trial judge. The court's language can more easily be reconciled with such a finding: "None of these regulations were designed to protect from the harm you claim."

"Not all violations of statute constitute negligence per se. The doctrine generally provides that ' " 'a presumption of negligence arises from the violation of a statute which was enacted to protect a class of persons of which the plaintiff is a member against the type of harm which the plaintiff suffered as a result of the violation of the statute.' " ' " (*Urhausen v. Longs Drug Stores California, Inc.* (2007) 155 Cal.App.4th 254, 267 [violation of slope regulations for disabled parking space intended to facilitate disabled person's transfer between vehicle and wheelchair does not support negligence per se claim of disabled plaintiff crossing empty parking space on foot]; *Lua*, *supra*, 6 Cal.App.4th at pp. 1903-1905 [plaintiff injured while climbing over defendant's railway car while it was stopped blocking a traffic intersection was not entitled to negligence per se instruction because the statute limiting the time a railroad train may be stopped at a public intersection was designed to prevent traffic delays and blockage of emergency vehicles, not to prevent injuries].) "[I]f one is not within the protected class or the injury did not result from an occurrence of the nature which the transgressed statute was designed to prevent, Evidence Code section 669 has no application." (*Ramirez v. Nelson* (2008) 44 Cal.4th 908, 918; see generally *Nunneley v. Edgar Hotel* (1950) 36 Cal.2d 493, 496-498.)

For instance, a violation of a Vehicle Code section not intended to protect against traffic accidents does not constitute negligence per se in the event of an accident. (*Gilmer*

v. Ellington (2008) 159 Cal.App.4th 190, 203.) Likewise, in *Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, the Supreme Court held a non-student walking on a sidewalk across from a high school, who was injured when a student's car jumped the curb as he was leaving the school parking lot, could not use Education Code section 44807—which requires public school teachers to hold students accountable for their conduct on their way to and from school—as a basis for liability of any teacher or the school district. (*Id.* at pp. 930, 938-940.) The court reasoned that the statute was designed keep students safe on their way to and from school: " 'to regulate [students'] conduct so as to *prevent disorderly and dangerous practices* which are likely to result in physical injury *to immature scholars under their [teachers'] custody*.' " (*Id*. at p. 938.) Because Hoff's injury did not result from an occurrence of the nature which the statute was designed to prevent, and Hoff was not of the class of persons for whose protection the statute was adopted, the Supreme Court held the school district was properly granted a nonsuit in the trial court and reversed the Court of Appeal's judgment to the contrary. (*Id*. at pp. 938, 940.) The same form of analysis shows that no negligence per se instruction was required in this case.

3. Stelling's Performance of Services for the Senior Center

With respect to Stelling's performance, the Senior Center contends that Business and Professions Code section 5018 authorizes the California Board of Accountancy to prescribe rules of professional conduct, and every licensed accountant in California is governed and controlled by the rules and standards adopted by the board. California Code of Regulations, title 16, section 58 mandates that every licensed California accountant provide accounting services in accordance with professional standards. The Senior Center's expert witness, John Barrett, C.P.A., testified that the standards adopted in California are those developed by the American Institute of Certified Public Accountants (AICPA).

Stelling's C.P.A. expert, Barbara Guest, testified in detail why it was her opinion that Stelling met her standard of care as an accountant performing her contractual obligations. Guest conducted a review of Stelling's work and the Senior Center's

allegations and damages. Ultimately, she opined that Stelling did not breach her contract, nor did she cause any losses for the Senior Center.

Although he was called by Stelling as a witness, Burns was hired by the Oregon Board of Accountancy, not by either side in the dispute. After his independent investigation, which he described at length to the jury, he also concluded that Stelling did not fall below professional standards in doing the things she had contracted to do for the Senior Center, and she was not responsible for any of the Senior Center's losses. He concluded: "I do not believe Ms. Stelling failed to perform her duty in the letter of complaint. Ms. Stelling performed the engagement she was engaged to perform and did so satisfactorily for about ten years. Ms. Stelling was not a party to the events leading to the crisis."

As mentioned, the Senior Center did not provide Stelling's engagement letter when it filed its complaint with the Oregon Board of Accountancy, and it was not until late 2012 that Burns got a copy. Once he had obtained a copy of the engagement letter, Burns determined that Stelling had not failed to perform her duties as alleged in the letter of complaint. Burns described the spectrum of services an accountant can perform from low-level, non-attest bookkeeping services to high-level attest services, called assurance services, such as reviews and audits. He testified that Stelling was doing low-level, non-attest work for the Senior Center and contrasted that with Reynolds, who was doing high-level attest auditing. Burns testified "[w]hen it comes to non-attest services there are no . . . professional standards," although for both attest- and non-attest services there are ethical standards that must be adhered to. In addition, when Stelling was preparing financial statements, she was subject to professional standards.

Burns answered a series of questions derived from the Senior Center's accusations in Mazzei's complaint to the Oregon Board of Accountancy, testifying that Stelling did not violate any of the professional standards in any of the ways Mazzei had alleged. (The allegations in Mazzei's letter are similar to the allegations of the first amended complaint.) Burns also found as part of his investigation that Mazzei and the current

board president expected more of Stelling than what was spelled out in her engagement letter. He testified their expectations were unreasonable.

Burns found Stelling technically violated accounting regulations when she prepared compiled financial statements and gave them to the board of directors without including a disclaimer that she should have included indicating the financial statements were compiled from client-provided data and had not been audited. It was allowable for her to give these reports to Brande and other officers of the Senior Center, but in giving them to the other members of the board who were not part of management, without the disclaimer, she technically provided them to third parties and thereby violated a rule which Burns described as a "minor" "technical violation," unrelated to the Senior Center's allegations or damages. Guest agreed with Burns's assessment.[5]

The parties have not cited, and we have not located, any case within California deciding whether a violation of AICPA standards would warrant a negligence per se instruction. Looking outside California, we find the federal district court for the district of New Jersey, refused to apply the negligence per se rule to a violation of AICPA standards because it concluded the New Jersey Supreme Court would most likely find a violation of AICPA standards does not give rise to a claim of negligence per se. (*Chelsea Check Cashing, L.P. v. Toub* (D.N.J. No. 02-5557 Jan. 9, 2006) 2006 U.S. Dist. LEXIS 521, at pp. *8-9.) At the very least, we must examine the precise violation of an AICPA standard to determine whether the Senior Center is of the class for whose benefit the rule was adopted and whether the Senior Center was injured by an occurrence of the nature which the AICPA standard was designed to prevent.

[5] Documents admitted in evidence tended to show Stelling had committed three technical violations. Besides the one just discussed, Stelling failed to register her firm and failed to enroll in and participate in peer review. These, too, were technical violations not affecting the Senior Center's losses.

4. The Senior Center Has Shown No Violation of AICPA Standards Giving Rise to Application of Negligence Per Se Doctrine

The specific violations of AICPA standards that the Senior Center alleges are difficult to pinpoint. Barrett testified that Stelling's professional obligations included the responsibility to be objective, to exercise due professional care, to demonstrate professional competence, and to have knowledge of the Senior Center's industry and business transactions. Though Barrett testified Stelling had violated these standards, they are by their nature so broad, aspirational and imprecise that a presumption of negligence should not arise from an expert's testimony to their violation without more specificity. Such broadly-defined standards, by their very nature, will be subject to differing opinions as to whether they have been violated. Before a presumption of negligence should arise, the standard in question must be one the violation of which is more concrete and subject to more objective ascertainment.

Indeed, when cross-examined at trial, Barrett could not cite a specific standard or regulation that he thought Stelling had violated. It was just his overall opinion that she "violated standards" generally. The Senior Center points out that Mazzei testified Stelling relied on timesheets from employees that did not contain sufficient detailed information to allocate their time to specific jobs and to certify compliance with the grants. Mazzei, of course, was not at the Senior Center while Stelling worked there, and therefore was in no position to say how the allocation decisions were made. Stelling testified that Silvey was the one who allocated expenses to specific accounts and grants for the energy program. The Senior Center now cites general testimony by Barrett that using the timesheets to prepare the certification fell below the "standard of care," without citation to a specific AICPA standard that had been violated. Such nonspecific testimony, in light of the uncertainty in the record about who decided on cost allocations for the energy program, does not give rise to an obligation to instruct on negligence per se.

The only other specificity provided by the Senior Center in its briefing is that, to comply with the standard requiring familiarity with the client's industry and business,

Stelling should have read all the contracts the Senior Center had received through CSD. It points to no language in the engagement letter requiring as much. Such an onerous duty cannot be read into the professional standard in question for someone who signed an engagement letter to perform only bookkeeping and related services.

On the other hand, Barrett and Burns both testified that additional professional standards applied to Stelling's preparation of financial reports for the Senior Center, including a responsibility to disclose the degree to which the data underlying the reports had been analyzed. Burns's testimony suggests this could have been accomplished by adding disclaimer language to the engagement letter or to the financial statements themselves. The Senior Center claims Stelling violated this requirement, and there is evidence to support that claim.

There is no evidence in the record, presented by either side, that Stelling was hired to do a fraud audit. Whatever else may be said about this violation, moreover, the standard at issue was not among those aimed at detecting embezzlement, assessing contract compliance, detecting deficiencies in internal financial controls, or otherwise preventing the type of harm that the Senior Center ultimately suffered. The AICPA standard seems to be designed to prevent a third party's overreliance on unaudited internal financial statements. There is no evidence the Senior Center's board acted in reliance on the interim unaudited financial statements to its detriment. The losses it suffered were not of the nature that the violated AICPA standard was designed to prevent, and presumption of negligence did not apply. There was no error in failing to give the requested instruction.

B. Insufficiency of the Evidence to Support the Verdicts

1. Evidence of the Senior Center's Negligence

The jury found the Senior Center 100 percent negligent in causing its own lost contracts. This finding suggests the jury believed Stelling's version of events, namely that the Senior Center overreacted to Brande's accusation of Silvey's malfeasance and, as Stelling suggests, allowed the problem to "snowball" into the "mess" it became. The Senior Center claims there was no supporting evidence at trial for a finding of negligence

on its part. On the contrary, if the jury believed Stelling's version of the facts (and apparently it did), then there was more than substantial evidence to back up the verdict. Stelling's own testimony and the testimony of Guest and Burns supported the verdict.

According to Stelling's evidence, Reynolds, lacking the objectivity required of an auditor, yet acting in that capacity, influenced the Senior Center to embark on a financially disastrous course of action, which included: (1) firing Brande and Silvey, thereby creating a "leadership vacuum"; (2) retaining a new interim executive director who had no first-hand knowledge of what happened before her hiring, but was tasked with trying to straighten out the mess; (3) Reynolds's and Mazzei's refusal to reach out to Brande, Silvey or Stelling for help with CSD's file review; (4) reporting Silvey to the local district attorney to be prosecuted for embezzlement, forgery and burglary; (5) terminating Stelling's bookkeeping services without even consulting a copy of her engagement letter; (6) filing complaints with the Boards of Accountancy of California and Oregon regarding Stelling's work, without doing enough research into what was expected of Stelling; (7) reporting unfounded suspicions of fraud to CSD, including accusations that Stelling was "covering" for Silvey, which led to cancellation of the Senior Center's contracts and demands for grant reimbursement; and (8) ultimately, suing Brande, Silvey and Stelling for damages, and specifically targeting Stelling without a full investigation of her liability.[6] There was substantial evidence supporting these allegations and thus supporting the jury's finding of negligence on the part of the Senior Center.

2. Evidence of Stelling's Non-negligence

We have already summarized at some length Burns's testimony about Stelling's performance of the tasks she had undertaken to perform in her engagement letter with the

[6] Stelling alleges the Senior Center's trial strategy was to go after Stelling on joint and several liability based on Reynolds's accusations of Stelling's alleged professional negligence. Stelling alleges Brande and Silvey are essentially judgment-proof, and the Senior Center sought to hold Stelling negligent even by a small percentage in the hope of recovering all its damages from Stelling or her insurer.

Senior Center. His testimony and that of expert witness Guest constitute substantial evidence that Stelling was not negligent.

3. Evidence of Value of Lost Contracts

The Senior Center next challenges the sufficiency of the evidence to support the jury's finding that it lost roughly $170,000 in administrative revenue because of canceled or suspended contracts after Brande informed CSD of Silvey's embezzlement. Mazzei testified the amount lost was about $131,000. CSD-employee witness, Jason Wimbley, first testified the Senior Center lost administrative revenue of between $152,000 and $160,000. The Senior Center's counsel then provided Wimbley with Exhibit 34, a table showing a breakdown of cost components of the DOE and LIHEAP contracts. After reviewing Exhibit 34, Wimbley changed his answer and said there was a loss of "administrative revenue" of $322,000. So, the evidence showed the lost administrative revenue from suspended contracts was somewhere between $131,000 and $322,000—a nearly $200,000 range. The Senior Center now argues the jury could have determined the lost contracts to have cost the Senior Center $131,000 or $322,000, but the figure actually awarded—$170,000—finds no support in the evidence.

"[E]vidence is insufficient to support a damage award only when no reasonable interpretation of the record supports the figure." (*Toscano v. Greene Music* (2004) 124 Cal.App.4th 685, 691.) The jury here had a wide range of numbers from which to make its determination; it settled on $170,000 and attributed that amount entirely to the Senior Center's negligence. Exhibit 34, a CSD-created table, shows amounts allocated to various budget categories in administering the contracts that the Senior Center lost. Wimbley described the document and pointed out specific categories of costs that contributed to the Senior Center's losses. He suggested that "admin" categories in the table would correspond to the revenue the Senior Center would have derived from the energy contracts had they not been redirected to other service providers. If "admin" amounts from Exhibit 34 are added up for all affected contracts, the result is $165,029, not far from what the jury assessed. Wimbley also suggested that "intake" categories might also be considered when calculating the value of the Senior Center's lost contracts.

Beyond "admin" and "intake" amounts, we find Wimbley's testimony ambiguous as to whether or which additional amounts should be considered losses to the Senior Center's revenue.

Although we cannot precisely reconstruct the jury's calculation of damages, it is within the range of losses established by the evidence (and far from the extremes of that range), the totality of which supports the verdict. Wimbley also testified that administrative revenue would be roughly five to ten percent of the total value of the contracts (per Exhibit 34, $3,053,507), or $152,675 to $305,350. Again, the amount calculated by the jury falls within that range and is close enough to the lower percentage (5.56 percent) to justify the jury's computation.

C. Expert Witness Fees

Code of Civil Procedure section 998 (section 998) provides in relevant part: "If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover postoffer costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant." (§ 998, subd. (c)(1).)

About seven months before trial, Stelling made an offer under section 998 to the Senior Center in the amount of $163,636.53. The offer expired without acceptance. After trial, Stelling filed a memorandum of costs, claiming costs both under Code of Civil Procedure section 1032, subdivision (a)(4) as a prevailing party, and under section 998. The Senior Center filed a motion to tax costs. After a hearing, the trial court awarded almost all the claimed costs to Stelling.

The costs award included $30,410.91 in expert witness fees. The Senior Center acknowledges that section 998 gives the court discretion to award expert witness fees but claims this was an abuse of discretion because Stelling's offer was not made in good

faith, but rather was made solely to qualify for the fee-shifting provision of section 998, subdivision (c)(1). (See *Wear v. Calderon* (1981) 121 Cal.App.3d 818, 821-822 [offer must be made in good faith]; *Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 699 [offer should approximate exposure of offering party].)

The Senior Center contends the offer of $163,636.53 was not based on a reasonable assessment of Stelling's potential exposure, but rather was a calculation of how much money the Senior Center determined it must recoup to again begin receiving contracts through CSD. The Senior Center had paid off $138,848.40 to the Department of Energy, so the settlement offer corresponded to exactly the amount the Senior Center owed to CSD. The Senior Center also contends Stelling knew at the time the offer was made it would be rejected, and it was not made in good faith. We review a costs award under section 998 for abuse of discretion. (*LAOSD Asbestos Cases* (2018) 25 Cal.App.5th 1116, 1123; *Adams v. Ford Motor Co.* (2011) 199 Cal.App.4th 1475, 1482.)

The Senior Center emphasizes that it was seeking damages of roughly $525,000 at the time the offer was made. It argues, based on principles of joint and several liability, Stelling stood to be on the hook for the full amount, even if she were found minimally negligent. The Senior Center contends Stelling's offer was unreasonably low and not a good faith estimate of Stelling's exposure.

We disagree. Even a "modest settlement offer" may be in good faith if the offeror believes she or he has a significant likelihood of prevailing at trial. (*Culbertson v. R. D. Werner Co., Inc.* (1987) 190 Cal.App.3d 704, 710.) The Senior Center fails to take account of weaknesses in its own case—and of the strength of Stelling's defense. Burns had already made his report on his investigation at the time of Stelling's offer, and the Senior Center knew it was favorable to Stelling. The Senior Center by then had Stelling's engagement letter, so it knew the limited nature of her undertaking. The Senior Center misjudged the strength of its case. We do not find the trial judge's award was an abuse of discretion, even if Stelling took an unusual approach in approximating her exposure.

Section 998 is straightforward. Where, as here, the offeror obtains a judgment more favorable than its offer, the judgment itself constitutes prima facie evidence showing the offer was reasonable. (*Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal.App.4th 102, 117; *Adams v. v. Ford Motor Co.*, *supra*, 199 Cal.App.4th at p. 1484.) In *Santantonio*, the court held that a defendant's statutory offer of $100,000 was prima facie reasonable because the defendant had secured a verdict of no liability at trial, even though the plaintiff sought $900,000 in damages. (*Santantonio*, at pp. 117-118.) Given the verdict, the burden was on the plaintiff to show the trial court had abused its discretion in concluding the defendant's offer was reasonable. (*Id*. at p. 117; see also *Adams v. Ford Motor Co.*, *supra*, 199 Cal.App.4th at p. 1484 [Ford's settlement offer of $10,000 in a case in which it was found to have no liability was sufficient to trigger plaintiff's obligation to pay Ford's costs, including $167,570 in expert witness fees, where plaintiff had settled with other co-defendants for amounts ranging from $2,000 to $70,000].) The circumstances justified the trial court's determination that Stelling's section 998 settlement offer was reasonable, not a token offer.

Finally, the Senior Center points out that Stelling originally made her offer of $163,636.53 during a settlement conference prior to making the identical offer under section 998. The Senior Center rejected Stelling's offer initially. Stelling nevertheless tendered the same amount as a formal section 998 offer. That does not prove Stelling did not act in good faith in making the statutory offer. She had good reason to believe she would not be found liable at all—and indeed she was not. By driving home to the Senior Center that it might be liable for Stelling's expert witness fees, while offering enough to allow the Senior Center to resume its energy program, Stelling may well have believed she could bring the Senior Center to the settlement table. That is not only a proper use of section 998, it is the kind of thing the statute is designed to achieve. The court did not abuse its discretion in making the award.

III. DISPOSITION

The judgment is affirmed. Stelling shall recover her costs on appeal.

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Streeter, J.

We concur:

_____
Pollak, P.J.

_____
Tucher, J.